

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE SOUTHERN DISTRICT OF TEXAS

3 HOUSTON DIVISION

4 MAXIM CRUDE OIL, LLC § CASE NO. 21-cv-00090  
5 VERSUS § CORPUS CHRISTI, TX  
6 NOIL CORP., INC., et al. § THURSDAY,  
§ MAY 20, 2021  
§ 1:07 PM TO 2:14 PM

7 HEARING

8 BEFORE THE HONORABLE DAVID S. MORALES  
9 UNITED STATES MAGISTRATE JUDGE

10 APPEARANCES:

11 FOR THE PARTIES: SEE NEXT PAGE  
12 COURT REPORTER: SHARON RUSSELL  
13 COURT CLERK: ARLENE RODRIGUEZ  
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17  
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1           CORPUS CHRISTI, TEXAS; THURSDAY, MAY 20, 2021; 1:07 PM

2           CLERK: Court will call Civil Action C21-90, Maxim  
3 Crude Oil, LLC v. Noil Corp., Inc., et al. May I have  
4 appearances by counsel.

5           THE COURT: For plaintiff.

6           MR. ORTIZ: Yes, Your Honor. Antonio Ortiz here for  
7 the plaintiff, Maxim Crude Oil, LLC. As the Court is very  
8 aware, we are here on our motion seeking injunctive relief from  
9 the Court.

10          THE COURT: Yes. Let's go ahead and get the  
11 announcements first, and then you can proceed.

12          MR. ORTIZ: Sure.

13          THE COURT: And for the defense.

14          MR. NAVARRE: Thank you, Your Honor. Michael  
15 Navarre, Your Honor, for the defendants, Noil Corp., and Steve  
16 Neely.

17          THE COURT: And Mr. Jensen, who are you representing?

18          MR. ORTIZ: That's my client, Your Honor.

19          THE COURT: Okay. And what is your position there?

20          MR. ORTIZ: My position is attendance in the hearing.

21          THE COURT: No, no. Mr. Jensen.

22          MR. ORTIZ: Mr. Jensen is my client.

23          THE COURT: Oh, very good.

24          MR. JENSEN: I'm sorry, Your Honor. I missed that  
25 mute button. I'm sorry. I'm president of Maxim Crude Oil and

1 manager/owner.

2 THE COURT: Very good. Thank you.

3 Okay, Mr. Ortiz, you may proceed.

4 MR. ORTIZ: Thank you, Your Honor.

5 As I know that Your Honor has read through all the  
6 briefing that has been submitted by the plaintiff and the  
7 defendants, you know, we're here seeking an injunction that  
8 deals directly with \$600,000 in funds that my client sent over  
9 to the defendants; that much is undisputed. They don't dispute  
10 that they received those funds.

11 There is a dispute, I understand, as to whether or  
12 not these funds were escrow funds and whether or not there was  
13 an agreement that they would be treated as escrow funds  
14 segregated in an escrow account with all of the related legal  
15 obligations that come with that. But the fact that the funds  
16 were sent is absolutely not in dispute.

17 And so, what we're trying to accomplish here is  
18 safeguard those funds, is seeking an injunction that deals  
19 directly with those funds.

20 And on that note, I would like as just a preliminary  
21 issue, perhaps ask the Court that we establish, you know,  
22 whether -- and I'm sorry, let me back up.

23 The defendants' response and the defendants'  
24 briefings filed with this Court were my client's biggest fear,  
25 and that's the fact that no escrow -- now they're taking the

1 position that no escrow agreement existed, no escrow account  
2 exists, and I don't know exactly what that means. I don't know  
3 if that means their position is there's just no legal  
4 contractual obligations to maintain the escrow account or if  
5 they're saying that there's no account that has these funds at  
6 all.

7 And, you know, when there is a legal obligation to  
8 have an escrow agreement in place, you know, I think that's, I  
9 think, an issue that is for trial on the merits, but that has  
10 nothing to do with my injunction pleadings. No matter what  
11 they call the account, you know, I think we'd like to know  
12 whether there's an account out there that has my client's money  
13 or that can be traced back to the \$600,000 my client sent that  
14 is in the defendants' position or control, and I think that  
15 they need to tell this Court whether there's a bank account out  
16 there that they control that holds that money.

17 And if they say no, that means they've spent the  
18 money and that the relief that the plaintiff is seeking here,  
19 it might just be moot and a waste of this Court's, you know,  
20 resources and the attorneys' time and clients' money, and I  
21 think that's a threshold issue is to what we're trying to  
22 accomplish here.

23 Of course, I'm ready to proceed with my arguments on  
24 the merits of the injunction and the elements and why it's  
25 necessary here. But I'd like to know, I guess, that, you know,

1 we're here -- we're trying to accomplish something that can be  
2 accomplished.

3 THE COURT: Mr. Ortiz, prior to filing this suit or  
4 since the filing of the suit, have you attempted to reach an  
5 agreement concerning the \$600,000 being put in the registry of  
6 the court or being put in a fund pending the outcome of the  
7 litigation?

8 MR. ORTIZ: I have, Your Honor. I have asked that  
9 the funds be deposited in the registry of the court. I'm not  
10 sure if I had that conversation with current defense counsel,  
11 but I had that conversation with prior counsel.

12 I did ask current defense counsel whether he has  
13 confirmed that the funds do exist, you know, whether they are  
14 in an account. He was not willing to disclose because he  
15 believed that to be attorney-client privilege communications  
16 and I sort of stopped there.

17 But I have tried to discover the answer to that  
18 question, and I have been unsuccessful.

19 THE COURT: So before we get started, Mr. Navarre --  
20 and is it Navarre or Navarre?

21 MR. NAVARRE: It can go both ways, Your Honor. It's  
22 generally speaking the "e" is silent though.

23 THE COURT: Okay.

24 MR. ORTIZ: That's why I didn't say it.

25 THE COURT: So there was an injunction from the state

1 court, which I'm sure --

2 MR. NAVARRE: That's correct.

3 THE COURT: -- your client complied with, and then it  
4 was extended by this Court pending this hearing. What has your  
5 client done to comply with that order?

6 MR. NAVARRE: Yes, Your Honor. My understanding,  
7 Your Honor, is that prior to the TRO being entered into by the  
8 state court, some of those funds, my understanding is more than  
9 half of those funds, were already disbursed I guess or what  
10 have you. When the TRO was entered by the state court,  
11 Illinois counsel, who I think Mr. Ortiz was referencing as  
12 prior counsel, instructed the client not to move any additional  
13 funds that were remaining of that \$600,000.

14 When I became involved in the case even before the  
15 hearing, I made the same thing. The client has confirmed to me  
16 the understanding that there has been no movement, any  
17 additional movement of any of those \$600,000 in funds.

18 But to answer the Court's question, some of those  
19 funds were previously moved before the TRO.

20 THE COURT: So concerning the funds that are  
21 remaining, let's say roughly \$300,000.

22 MR. NAVARRE: I think it's -- just so I don't mislead  
23 the Court, I believe it's about \$160,000, Your Honor, that  
24 remains.

25 THE COURT: So with the remaining funds that are

1 there, is there any -- is there a problem with agreeing to that  
2 amount remaining in status quo pending the litigation?

3 MR. NAVARRE: I have not discussed that with my  
4 client, Your Honor. My only discussions with opposing counsel  
5 had nothing to do with putting money in the registry of the  
6 court; they had to do with a settlement to pay the \$600,000.  
7 So that's about all I can say, I think, Your Honor.

8 I do think if we go to the argument, Your Honor, I  
9 think will go to show that an injunction should not occur in  
10 this case.

11 THE COURT: Okay. Well --

12 MR. NAVARRE: As a matter of fact, appreciate the  
13 Court -- I understand the Court's question.

14 THE COURT: Yes. And so, that by agreement is wholly  
15 separate and apart from the injunction.

16 MR. NAVARRE: Yes, sir.

17 THE COURT: And I was just wondering if that had been  
18 approached. But there's your answer, Mr. Ortiz. There is  
19 still some funds that are pending that would be subject to the  
20 injunction if all of the elements are met for a preliminary  
21 injunction; it's just not the entire amount.

22 So with that, let me let you know, Mr. Ortiz, the  
23 issue that's causing the Court the most concern is the  
24 likelihood of irreparable harm and why damages would not be a  
25 suitable legal remedy for your client. Obviously, we've got



1 breach of contract claims going both ways.

2 My understanding is that the amount at issue in the  
3 first contract or in the contract was something north of 2  
4 million, something like \$2.4 million, of which 2 million was  
5 paid, 1.6 returned -- or 1.4 returned with 600,000 being what  
6 we're discussing today. So I'm not sure if the additional  
7 \$400,000 is still something the defendants would seek to  
8 recover as far as damages, or if the damages are just the sole  
9 amount here.

10 But we've got these breach claims that are going both  
11 ways. And at the end of the day, even if the \$600,000 was  
12 there, it seems to the Court that there would be an adequate  
13 remedy at law and whatever is owed to Maxim would be able to be  
14 recovered pursuant to monetary damages.

15 So if you could put the Court's mind at ease about  
16 that, that is what's causing me the most concern with entering  
17 a preliminary injunction.

18 MR. ORTIZ: Your Honor, well, with respect to what  
19 they claim to be a breach, I'll establish here -- and I've got  
20 a PowerPoint that I'd want to walk you through -- the agreement  
21 for the escrow and, you know, the evidence, all of which is in  
22 writing.

23 I've never had a case that has so much in writing  
24 that deals with fraud because usually that's a lot harder to  
25 prove. I like to say fraud is rarely committed in the light of

1 day, but I believe here, you'll find the opposite to be true.

2 THE COURT: Well, Mr. Ortiz, just concerning breach  
3 just so you know, the Court is likely to find that you have a  
4 likelihood of success. I'm just going to assume that. It's  
5 this last part that's causing me concern.

6 MR. ORTIZ: Sure. Well, I guess to get into that  
7 issue, I'd have to get into the history of the defendants, and  
8 that's Mr. Neely himself and this Noil Corp., Inc. And that,  
9 for me to do that, I'd have to tell you first about Noil  
10 Petroleum, Inc, and that was a previous entity owned by Mr.  
11 Neely that -- there's a series of litigation that's been filed  
12 against Noil Petroleum Corp. that involves a lot of the same  
13 sort of allegations that we have here where people have paid  
14 for fuel for it to be delivered and no fuel shows up.

15 Noil -- and that has resulted in lawsuits by Marathon  
16 Petroleum, Potent Petroleum, L. Energy International, and  
17 Genesis Marine, all against Noil Petroleum. Marathon was  
18 awarded a judgment in excess of a million dollars, and I think  
19 at least a couple of others were awarded judgments in excess of  
20 \$7 million. It's my understanding that none of them have ever  
21 collected a dollar on those judgments.

22 Now, Noil Petroleum Corp. was involuntarily dissolved  
23 in September 2020, where Mr. Neely just started doing business  
24 under Noil Corp. It's the identical website. It's all the  
25 identical business activities. It's just a new shell entity

1 conducting the same sort of shame operations. Mr. Neely  
2 himself has filed bankruptcy five times in two different  
3 states, with the most recent bankruptcy being in Illinois. I  
4 believe the case was closed in November of 2019. So we have  
5 defendants here who have a history of misappropriating funds,  
6 of converting funds.

7 L. Energy International in their lawsuit alleged that  
8 Mr. Neely was running a Ponzi scheme through Noil Petroleum  
9 Corp. And so what has he done? He's just shut down Noil  
10 Petroleum Corp. and started doing business under Noil Corp.  
11 with the identical website that it's obvious in certain  
12 portions he just deletes the actual word Petroleum in the name  
13 of the entity.

14 The video that he uses on his website, it's the same  
15 video he used for Noil Petroleum Corp. where he advertises, you  
16 know, he markets himself to, well, the entire country, claims  
17 to be one of the nation's leading fuel provider. Actually  
18 claims to be fueling the nation -- that is their tag line --  
19 and claims to have defense contracts, all of which there's no  
20 evidence to be true.

21 There's just substantial evidence there that he's  
22 mishandled/misappropriated funds, and the funds at issue here,  
23 you just heard Mr. Navarre say that he's already spent some of  
24 the money. So the only reason that there's -- whether there's  
25 160 or 120, the only reason there's \$160,000 left is because he

1 was told by his lawyers not to spend it when we have an  
2 agreement in place that will show that there was -- it could  
3 not have been more crystal clear that the agreement was that he  
4 was not -- that the funds were not to be removed from the  
5 account until plaintiff had received its product. Plaintiff  
6 never received its product.

7 THE COURT: Was that in the -- Mr. Ortiz, was that  
8 memorialized in the written contract?

9 MR. ORTIZ: It was -- yes, it's memorialized in the  
10 invoice sent with the contract, and the invoice says, "To be  
11 held in the trade account, not to be disbursed until product  
12 has been confirmed as lifted." And then there's a message, an  
13 email, where they say that their trade account, which is  
14 referenced on the invoice, actually means their escrow account.  
15 And I could show you that right now if you'd like me to  
16 screenshot it.

17 THE COURT: I've reviewed that, so please proceed.

18 MR. ORTIZ: Okay. So there, I mean, that's as  
19 explicit as you could possibly be. But also, the agreement  
20 itself, you know, the actual, you know, approved products  
21 agreement says that the payment terms -- well, it says, "Jobber  
22 shall, except at Noil's option, pay Noil cash before delivery  
23 or pickup." However, there's a section that says, "Change of  
24 payment terms," and it says, "Terms of payment are subject to  
25 change based on agreement written with jobber."

1 Well, I will show you at least 12 different written  
2 correspondence where they acknowledge the agreement that there  
3 would be an escrow structure. They refer to the funds as  
4 escrow funds. They refer to the account as an escrow account.  
5 They ask about the status of the remaining escrow funds. I  
6 mean, you know -- I have it in one slide up -- and these  
7 representations were made before the contract was entered into,  
8 the day the contract was entered into, after the contract was  
9 entered into.

10 And even after I got involved, Mr. Neely was telling  
11 my client that his lawyer would send a screenshot of the escrow  
12 account that shows all of the funds are there in place and have  
13 not been touched.

14 So there was an agreement to have those funds be  
15 treated as escrow funds, be placed in an escrow account, and to  
16 not be touched until the product has been confirmed by  
17 plaintiff as being lifted. No product was ever delivered.

18 Also, the price that they used for the product is  
19 dated March 15th. Well, as of April 15th, their lawyer  
20 confirmed that they still hadn't secured any product, but the  
21 price is supposed to be that price and, in fact, at the time of  
22 delivery. So there's no way they could even come up with the  
23 price on March 15th for a product that they still hadn't had  
24 access to a month later.

25 THE COURT: And when did they have access to the

1 product that supposedly you declined, or your client declined?

2 MR. ORTIZ: They claim my client declined the  
3 product, but it was after they were unable to supply it for two  
4 or three weeks. And my client had told them that he had  
5 purchasers that -- timely preparing this product was very  
6 necessary and they said that the product was there so that my  
7 client would wire the funds.

8 And then it became excuse after excuse as to why they  
9 couldn't get codes necessary to lift the product at the  
10 terminal and then my client would demand to be paid back. My  
11 client even offered to provide a letter of credit from JPMorgan  
12 Chase Bank if they would return the \$2 million; that way, he  
13 knew at least his money was being safeguarded during this time  
14 they were trying to secure the product.

15 All the excuses that they came up for over a month is  
16 what led my client -- my client eventually found an alternate  
17 source for this because he had -- you know, they had \$2 million  
18 of his operating capital tied up for a month, which is huge,  
19 you know, for my client and he's not a huge company. Two  
20 million dollars is a massive amount of money for him; of  
21 course, it's even more than enough money when I consider it.

22 But that left him without operating capital. He was  
23 having to actually get -- factor some of his invoices at  
24 extremely high interest rates and he had no choice. They never  
25 received confirmation that they actually have the product ever.

1 THE COURT: Okay. So the Circuit tells me that I can  
2 only find irreparable harm where there's no adequate remedy at  
3 law, such as monetary damages. So explain to me why monetary  
4 damages wouldn't solve all of those issues if you were to  
5 prevail on the merits.

6 MR. ORTIZ: Well, Your Honor, there's case law that  
7 says there's title to the property of the funds are in dispute,  
8 the proper remedy is to place those funds in the registry of  
9 the court. Also, there is other case law that says that the  
10 likelihood that -- I'm sorry -- the unlikelihood or the  
11 speculative nature in which you'd be able to collect monetary  
12 damages from a defendant is also a factor that we can consider  
13 in granting injunctive relief.

14 And here, we have a defendant that -- if no  
15 injunctive relief is granted and they are no longer under the  
16 TRO that's currently in place, those funds will be gone. Mr.  
17 Neely will file bankruptcy again. There's simply -- I have no  
18 confidence at all, and I think the evidence proves, his history  
19 proves that there'd (indiscernible) ever be recovered.

20 THE COURT: So the evidence that the Court's going to  
21 find on if the Court were to find in your favor is the Law 360  
22 article that you introduced, the memorandum and order from  
23 Northern District of Ohio, as well as the bankruptcies,  
24 correct?

25 MR. ORTIZ: Yes. I would like to offer, you know,

1 the lawsuits or I guess the order of judgment for Marathon  
2 Petroleum and also, the dissolution of Noil Petroleum Corp. and  
3 the fact that Noil Corp. was then created a year after the  
4 Marathon litigation was instituted.

5 THE COURT: Okay. Mr. Navarre.

6 MR. NAVARRE: Thank you, Your Honor. Let's start  
7 with that if you don't mind. Yes, there's a Law 360 article  
8 about a recently filed L. Energy case in Harris County.  
9 There's no judgment in that case, Your Honor. There's been no  
10 discovery in that case; nothing has occurred in that case.

11 Counsel previously talked about civil judgments  
12 against Noil Petroleum Corp. No judgment in that case. And in  
13 that case, as Mr. Neely is quoted in the article, he explains  
14 that what happened was the person went behind his back to get  
15 the customer, then that customer didn't pay, so that doesn't  
16 prove anything. It doesn't prove failure to pay, et cetera.

17 The Marathon case, Your Honor, went up on appeal. I  
18 believe it just came back on appeal, and it's now in the  
19 proceedings as far as judgment. That case is not like this  
20 case at all. In that case, the disputes, and the Court will  
21 see from looking at the opinion, the dispute was who -- was  
22 where the destination was going to be as far as the slurry in  
23 the case. It has nothing to do with the allegations that are  
24 being made in this case whatsoever.

25 Counsel mentioned two other cases that he says



1 there's judgments on. It's not in the record, Your Honor. I'm  
2 not aware of those. Had those been brought up in the briefing,  
3 I would have been more than happy to respond to it, but that's  
4 obviously no evidence.

5 Now, as far as Noil Corp. versus Noil Petroleum  
6 Corp., we cited in our response, Your Honor, the case of the --  
7 I guess it turned out to be Russian fraudsters who were using  
8 the name Noil for a tax evasion scheme. And what we submitted  
9 to the Court, Your Honor, was from Lexis, the recent opinion  
10 convicting those people of fraud.

11 The Court will notice that Mr. Neely and Noil Corp.  
12 and Miss Jennifer Watson, who is the person dealing mostly with  
13 Maxim, none of them were there. That's why the name -- that's  
14 why we now are Noil Corp. is because of that fraud and the  
15 repercussions of that. Had nothing to do with Mr. Neely, Mr.  
16 Neely was not a defendant, et cetera.

17 As far as Mr. Neely's personal bankruptcies, those  
18 were discharged, et cetera, and they don't show anything. And  
19 frankly, Your Honor, to show that there's no adequate remedy at  
20 law with respect to Mr. Neely, they have to get past the -- you  
21 know, being successful on the case, the likelihood of success.  
22 And with respect to Mr. Neely, there's just nothing there;  
23 there's not even factual allegations in the petition.

24 And as the Court is aware, we did file the motion to  
25 dismiss, as we had promised to do so, on the basis of

1 jurisdiction, so before we can even get to the --

2 THE COURT: When was that filed, Mr. Navarre?

3 MR. NAVARRE: I'm sorry, Your Honor.

4 THE COURT: When was that filed?

5 MR. NAVARRE: Oh, shoot. I believe that was filed  
6 maybe --

7 MR. ORTIZ: A week ago.

8 MR. NAVARRE: Yeah, a week ago. It was filed a day  
9 early actually, Your Honor, which meant I got to sleep that  
10 night, along with our -- then we also filed an Answer in the  
11 case obviously. So that puts Mr. Neely aside.

12 With respect to Noil Corp., if the claim is because  
13 the corporation is closed down, that means that there's no  
14 adequate remedy of law because the prior corporation was closed  
15 down. Well, Your Honor, that's frankly why we cited the case  
16 where Mr. Jensen was personally sued, along with two of the  
17 companies that look like they're no longer doing business with  
18 Mr. Jensen, and the claims about stolen gas by Mexican cartels  
19 being resold by Mr. Jensen and many other companies. And those  
20 two companies, Big Star Gathering and St. James, I think, at  
21 least based upon searching through the records, those companies  
22 have been closed down.

23 So that kind of swings both ways, if you will, Your  
24 Honor, where frankly, no evidence as far as no adequate remedy  
25 of law. We cited in our briefing the court cases that

1 establish that monetary damages is adequate as a matter of law.  
2 The exception that counsel is trying to argue is not supported  
3 by the evidence here.

4 But, Your Honor, I would like to address the question  
5 of the success on the merits, the likelihood of success, which  
6 they bear the burden of with this extraordinary remedy. And in  
7 this case, Your Honor, it is undisputed, undisputed that Maxim  
8 breached the contract.

9 The invoice that counsel referred to had a payment  
10 due date of March 16th in the amount of \$2.8 million. Even the  
11 evidence offered by Maxim shows that they didn't pay anything  
12 before that due date; they paid \$2 million on March 22nd and  
13 March 26th combined. They've never paid the full amount, Your  
14 Honor.

15 We have an email that we attach as Exhibit 4 of Mr.  
16 Jensen on March 18th, so this is two days after the deadline  
17 for payment that was required by the contract and by the  
18 invoice, both of which Mr. Jensen signed on behalf of his  
19 company, Maxim.

20 In that email, he said that, "I've had to move some  
21 additional funds out of money market type of account, which has  
22 taken a few days longer than I anticipated transfer over."  
23 That was his excuse for not having to pay the full amount yet.  
24 He then stated, "I think we should have everything straightened  
25 out by tomorrow." Tomorrow would have been March 19th. Money

1 market funds, Your Honor, can be moved rather quickly. But  
2 more importantly, contrary to his promise to have everything  
3 straightened by tomorrow, the \$2.8 million was never paid.

4 And we cited black letter case law, a longstanding  
5 Texas case law, that you cannot enforce a provision of a  
6 contract when you have breached that same contract. You can't  
7 pick one provision and enforce it while breaching the other  
8 provisions.

9 And really, Your Honor, what they're seeking here is  
10 specific performance of a contract that they breached of a term  
11 that does not exist. I will assure the Court I have looked  
12 through the crude services agreement several times, both with  
13 my eyes and also using (indiscernible) pdf, the find function,  
14 to see if the word escrow was in there. The word escrow is  
15 nowhere in there.

16 Yes, there are communications between Miss Watson,  
17 who -- and they submitted an affidavit from her. She's not a  
18 lawyer, she didn't go to law school. She did use the word  
19 escrow before the contract, Your Honor, and even after the  
20 contract, Your Honor, but there's no escrow agreement.

21 In an escrow agreement, you have a third party that  
22 holds the escrow, you have a purpose for the escrow that's set  
23 forth, you have conditions as far as how the money is going to  
24 be held and by who. You also have conditions as far as how the  
25 money is going to be disbursed when the escrow agreement

1 terminates or on other conditions. That does not exist, Your  
2 Honor.

3 And importantly, in this case, the contract itself,  
4 Your Honor, states, and this is in Section 21 in its inter-  
5 briefing. Contract states that the crude products agreement,  
6 "Terminates and supersedes any prior agreements between Maxim  
7 and Noil." This is the agreement, that's it, no more.

8 And, Your Honor, counsel tried to say, well, we've  
9 got emails showing an agreement that could be an escrow  
10 agreement. That doesn't do the trick, Your Honor, because in  
11 the contract itself, as you'll see in most contracts between  
12 sophisticated parties like these parties, the contract again in  
13 Section 20 states that any modification or waiver to contract  
14 must be, "in writing and signed by Noil Corp., Inc."

15 There is no modification of the contract, there is no  
16 waiver of any of the terms of the contract that was signed by  
17 and agreed to by Noil. The only other contract or agreement is  
18 the invoice, Your Honor, and that just takes away the whole  
19 breach of contract claim that they have because there's no  
20 escrow.

21 But even more importantly, Your Honor, because I  
22 heard counsel referencing more the fraud, Your Honor, they did  
23 not even set forth in their briefing the elements of fraud and  
24 trying to prove that they can prove the elements of fraud. One  
25 of the elements of fraud, as the Court is aware, is reliance.

1 But it's not just reliance, Your Honor, it is justifiable  
2 reliance, justifiable reliance. And the Texas Supreme Court  
3 consistently, especially in the last couple of years, has  
4 stated that as a matter of law, justifiable reliance is negated  
5 by the terms of a written contract.

6 And, Your Honor, I'd like to cite a couple of cases  
7 for the Court on that proposition. Number one is the Barrow-  
8 Shaver case, it is at 590 S.W. 3d 471; it's a Texas Supreme  
9 Court case in 2019. In that case, Your Honor, the contractual  
10 provision stated -- and I apologize if I was talking too  
11 quickly for the court reporter -- "The rights provided to  
12 Barrow-Shaver under this letter agreement may not be assigned,  
13 subleased, or otherwise transferred in whole or in part without  
14 the express written consent of Carrizo." That was the  
15 contractual provision, Your Honor.

16 Well, there was evidence, undisputed evidence that in  
17 the negotiations, representations were made that the assignment  
18 wouldn't be a problem, "It won't be a problem," "Don't worry  
19 about it. We will work with you. We will promise you the  
20 consent and it won't be a problem." So all of those statements  
21 remain, okay, before the contract as representations, and those  
22 were deemed to be alleged misrepresentations.

23 But the Court said written agreements, as well as  
24 oral agreements, serve a purpose under the law; they provide  
25 binding terms for the parties. "In this case, we recognize

1 that Laufer's oral representations and the consent to sign  
2 provision also do not involve precisely the same language." In  
3 other words, it doesn't have to be in the contract, you know,  
4 the light is red, and then the representation is the light is  
5 green.

6 If it's on the same subject matter and it conflicts,  
7 the written contract governs, and you cannot justifiably rely  
8 on representations that are contrary to what you agreed to in  
9 writing and that were signed and executed by Maxim by Mr.  
10 Jensen. The Court held that Barrow-Shaver could not  
11 justifiably rely on statements that purported to change the  
12 parties' written agreement.

13 And, in fact, Your Honor, that is in line with the  
14 other Texas Supreme Court authority, I would cite, to JPMorgan  
15 Chase Bank case versus Orca, and that's at 546 S.W. 3d 648,  
16 another Texas Supreme Court case in 2018.

17 And in that case, the Court states, relying -- I  
18 think quoting to another case, "As Texas Courts have repeatedly  
19 held, a party to a written contract cannot justifiably rely on  
20 oral misrepresentations regarding the contract's unambiguous  
21 terms." The Court went on to express the public policy in  
22 Texas with respect to freedom of contract and to have value put  
23 into written contracts. "It is to provide greater certainty  
24 regarding what the terms of the transactions are and that those  
25 terms would be binding, thereby lessening the potential for

1 error, misfortune, and dispute."

2           So, Your Honor, with respect to the substantial  
3 likelihood of success, they don't have a substantial likelihood  
4 of success. They cannot enforce a contract: number one, that  
5 doesn't have the escrow agreement provision that they would  
6 like it to have; number two, they cannot enforce it because  
7 they breached the contract and, frankly, Your Honor, they  
8 breached the contract first. The contract was breached on  
9 March 16th where they didn't pay the full amount. The contract  
10 continues to be in breach because they never did pay the \$2.8  
11 million.

12           And, Your Honor, if they go to the fraud  
13 misrepresentation, they have not provided evidence that they  
14 justifiably relied on it, and they can't because under clear  
15 and consistent Texas Supreme Court authority, they cannot  
16 justifiably rely on alleged oral, or in this case email or  
17 text, representations that are contrary to what they  
18 subsequently executed, so there's no substantial likelihood of  
19 success.

20           And, Your Honor, I can go into the other two  
21 requirements for injunctive relief, but frankly, Your Honor, I  
22 think those are two barriers that they cannot pass, and I  
23 appreciate the Court letting me go back. And, frankly, Your  
24 Honor, I appreciate the Court referencing the Court's initial  
25 thoughts on a substantial likelihood of success so that I could



1 address that; that is why we have, you know, hearings.

2 THE COURT: Exactly, and I wasn't saying that the  
3 issue was foreclosed. I was saying that I wanted to  
4 concentrate on one particular one, assuming the other.

5 Let me ask you before I go back to Mr. Ortiz, one of  
6 the elements is balance is hardships.

7 MR. NAVARRE: Yes, Your Honor.

8 THE COURT: What hardship would it create for your  
9 client to have the remaining \$160,000 remain as status quo  
10 pending the litigation?

11 MR. NAVARRE: Yeah. I think it's the same hardship  
12 on both companies frankly, Your Honor, and that is just having  
13 working capital, which I don't see that as a factor that goes -  
14 - or is a requirement that goes either way.

15 THE COURT: Okay.

16 MR. NAVARRE: And that is being as candid as I can  
17 be.

18 THE COURT: I understand. I appreciate that.

19 Mr. Ortiz, response.

20 MR. ORTIZ: Yes, Your Honor. Great arguments there,  
21 except nothing here contradicts the terms of the agreement.

22 If I may screenshare?

23 THE COURT: Yes, please.

24 MR. ORTIZ: It says it's disabled.

25 THE COURT: Let's see if there's something I can do.

1 MR. ORTIZ: I think if you click on participants,  
2 there'll be an option for you to allow me to screenshare.

3 CLERK: Okay. He should be able to share.

4 THE COURT: Okay. Mr. Ortiz, you want to give it a  
5 try?

6 MR. ORTIZ: Thank you, Your Honor. Well, as you can  
7 see here, the payment terms on the contract say that they're  
8 subject to change based on agreement with (sound glitch). It  
9 doesn't mean that it has to be a written, signed agreement.  
10 But no matter the case, you will see that before the agreement  
11 is even entered into -- I'm sorry, got the wrong slide here.  
12 Oh, there we are. I'm sorry.

13 You'll see that before the agreement is even entered  
14 into, Noil, through its representative Jennifer Watson,  
15 expressly states, "I can guarantee to have the contract today.  
16 It includes the escrow structure." And above, you'll see that  
17 it's crucial to Maxim that it has that escrow arrangement  
18 because it wants to save for those funds.

19 So then the agreement itself. Well, payment terms  
20 says shall pay Noil in cash before delivery or pickup. We did  
21 send the funds before delivery or pickup. Then there's Section  
22 6(c), which says, "The terms of payment are subject to change  
23 based on agreement written with (indiscernible)."

24 Well, we got no less than a dozen different  
25 representations where they acknowledged the agreement is having

1 an escrow account. Not only that, but we have the invoice  
2 which is sent with the contract, and it says, "Payment is to be  
3 held by Noil Corp., Inc. trade account until the first lift has  
4 been confirmed as completed." Now, no lift was ever made and  
5 there was never -- no lift was ever confirmed as completed. We  
6 know that they had \$2 million in their possession, and they  
7 were never able to produce the product we were trying to  
8 purchase.

9           So the money was supposed to be held in that trade  
10 account which, you know, normally if you have an escrow  
11 agreement when it says something about a trade account and not  
12 an escrow account, you know, red flags go off. But here's how  
13 they diffused that with these fraudulent representations where  
14 Miss Watson says the escrow listed on the invoice -- oh sorry --  
15 - the escrow is listed on the invoice as trade account escrow,  
16 not to be released until completed lift, date of first lift."

17           Now, there was no date of first lift because the  
18 product was never delivered. She's clearly -- she's  
19 supplementing the contract terms. She's actually defining what  
20 a trade account is by saying trade account actually means an  
21 escrow account.

22           And I think it's very important, it might be a subtle  
23 point, but it's crucial that the Court is aware that this  
24 contract is the defendants' contract that was provided to the  
25 plaintiff. Plaintiff did not have counsel draft their contract

1 or make redline changes or anything. This is 100 percent a  
2 version of defendants' contract that they prepared.

3 Now, even after, you know, this trade account issue,  
4 the invoice is sent. Again, Miss Watson refers to the funds as  
5 funds for the escrow trade account, just to keep the ruse  
6 going, to continue this fraud where they let the plaintiff  
7 believe that his funds are being sent to an escrow account  
8 where they will be safeguarded and will not be touched until he  
9 received the product.

10 And as to Mr. Navarre's claim that, well, we breached  
11 the contract because when we paid 2 million and the invoice  
12 had, I think, it was 2.3 something million. Well, here's the  
13 conversations between Miss Watson and the plaintiff where she  
14 says we are -- because the wires had to be sent in two separate  
15 wires, 1.5 million and then 500,000. And she says, "We're good  
16 to go. When will the other 500,000 be available? That is all  
17 we need." And then again, she says, "Once the other 500 comes  
18 in over the day or two, then we will be good to lift the full  
19 load."

20 So it's clear there she's representing, hey, just  
21 give us another 500,000, once you get to 2 million and you're  
22 good to go. Of course, the justifiable reliance on those  
23 representations is shown right here in Maxim's wire  
24 confirmations of \$2 million.

25 Even afterwards, here, April 2nd, well after the

1 contract was entered into, we have Miss Watson saying: "Your  
2 agreed escrow amount was not received until late last Friday.  
3 That was when the schedule was to be released. The refinery is  
4 the one who had not performed and caused issues. But as of  
5 today, Steve -- referring to Neely -- will send you what you  
6 need to lift. He's waiting on a final call from the scheduling  
7 desk now."

8           And these excuses just kept on and on and on until my  
9 client said, please give me my money back; I'm very concerned  
10 about these funds and said I'll provide a \$2 million letter of  
11 credit once you give me those \$2 million in funds back, because  
12 he's very concerned about their whereabouts and what they're  
13 doing with those funds. And the excuses as the time goes on,  
14 they just get more and more ludicrous.

15           And they say, oh, we have the product, and he says,  
16 okay, great, I'll send trucks over to pick it up. And they  
17 say, well, we kind of have it, we just need some codes, and  
18 once we get those codes, we'll have it for real. And he's  
19 saying, well, what do you mean; do you have it, or do you not  
20 have it? And then they say, we should have it by tomorrow.

21           And this continues for two weeks. Ultimately, he  
22 sends his termination letter on, I believe, it's April 6th, and  
23 the contract allows that -- says that the jobber can terminate  
24 with seven days' notice, which he provided. We did not hear  
25 from their attorney until April 15. And in that letter, the

1 attorney said would you like my client to cease seeking to  
2 procure that product, meaning as of April 15, they still had  
3 not secured that product.

4 It's my belief that -- it's my client's belief that  
5 they never intended to secure that product at all. This was  
6 just -- it was all about getting the funds. I don't know what  
7 they did with them. I don't know how they spent, you know,  
8 \$440,000 of it already, but they did. And they claim to be  
9 entitled to lost profits on the sale of product it never had to  
10 purchase. I just can't wrap my head around that and, you know,  
11 I hope it's not just me.

12 THE COURT: When was the contract without the escrow  
13 language signed?

14 MR. ORTIZ: March 16th. What do you mean without the  
15 escrow language?

16 THE COURT: Well, the contract. When was the  
17 contract signed?

18 MR. ORTIZ: The crude products agreement was signed  
19 March 16th, which is the same date that the invoice was sent  
20 that has the trade account language.

21 THE COURT: Sure.

22 MR. ORTIZ: It was actually sent in the same email.

23 THE COURT: So in those texts, the vice president was  
24 saying we're going to send you a contract with the escrow  
25 language in it; that was never done?

1 MR. ORTIZ: They sent the contract with the invoice  
2 that has the trade account language in it, and then she  
3 explained that trade account means escrow account.

4 THE COURT: Okay. So the contract itself didn't, but  
5 the language that you're referencing is in an attachment. Was  
6 it an exhibit to the contract, the invoice?

7 MR. ORTIZ: Well, so the crude products agreement is  
8 sort of a master services agreement that sort of covers the  
9 relationship with the parties. But then the individual  
10 purchases of crude that would have the amount, you know, the  
11 volume being purchased, the price for that particular volume,  
12 and then that's where the trade -- you know, the trade account  
13 language is contained. And you know, an invoice is, under  
14 Texas law, considered a contract.

15 THE COURT: Okay. Mr. Ortiz, other than what you've  
16 submitted to the Court, do you have any other testimony  
17 evidence or anything that you wish to present to the Court?

18 MR. ORTIZ: I have a whole bunch of text messages  
19 referencing the escrow funds and referencing their agreement  
20 for there to be escrowed, and I'd be happy to take you through  
21 that.

22 THE COURT: But these are all text messages that are  
23 included in your briefing, correct?

24 MR. ORTIZ: The only text messages that were not  
25 included in my briefing are the ones that I just showed you

1 where they acknowledge the \$2 million is enough, you know,  
2 we're not saying you breached any contract by not providing the  
3 2.3. And that's because the issue was raised for the very  
4 first time in their briefing I think that we received yesterday  
5 or maybe the day before yesterday because it's (sound glitch)  
6 that we breached the contract because only 2 million was there  
7 (sound glitch). So that's why I secured those text messages  
8 and that was not in my brief. I had not anticipated that  
9 argument.

10 THE COURT: Okay. Those will be in the record and  
11 the Court will consider those as part of the record as well.

12 Any reply, Mr. Navarre?

13 MR. NAVARRE: Yes, Your Honor.

14 Let's start with those messages and getting the  
15 product (sound glitch) that he doesn't think we ever tried to  
16 get the product or ever intended to. There's no evidence of  
17 that, Your Honor. On the contrary, Miss Watson's affidavit  
18 shows the opposite. The text messages show they were trying to  
19 arrange pricing terms, et cetera.

20 They also show that we thought we were going to get  
21 the product from the Valero, which is where Maxim had wanted us  
22 to get the product from. And they also show, Your Honor -- Mr.  
23 Jensen's shaking his head there -- but we also have an email or  
24 a text message in the record -- this is part of what Maxim  
25 submitted -- on April 7th and it's at Page 39 of this



1 submission. It's a text message, and I believe it's from Mr.  
2 Jensen where he says, "David has convinced me that we should  
3 wait another day based on his conversation with Valero."

4 So remember the agreement was signed about March  
5 15th/March 16th. By April 7th, both parties were trying their  
6 best to get product from Valero.

7 The problem, Your Honor, that we experienced and the  
8 problem that everybody experienced is that Valero had told us  
9 that they had the product for us. They had made a commitment  
10 to us, which we passed on to Maxim. However, we then found out  
11 subsequently that Valero was shutting down that Three Rivers  
12 terminal. And there's a text message frankly from Maxim that's  
13 also that there would never be product from that Three Rivers  
14 terminal and, therefore, we couldn't get it.

15 But at least on April 7th -- so this is, what, about  
16 three weeks after the contract was signed -- David, who I  
17 believe is David Hillman is his name, who works at Maxim was  
18 having phone calls with Valero where Valero was telling them,  
19 hey, we can get product, we can still do it. So as of April  
20 7th, everybody still thought we were going to get product from  
21 Valero. We always intended to do that.

22 And, Your Honor, even after we were starting to be  
23 threatened by Maxim, our people have continued to try to get  
24 product, and this goes back to the Court's prior question, and  
25 was able to obtain offers from other companies for product, but

1 those companies were turned down. But we also submitted  
2 evidence, Your Honor, in the record that at least one company  
3 decided not to do business with Maxim based upon their due  
4 diligence of Maxim and its history.

5 So we have tried to get product. We continue to try  
6 to get product even after things broke down, even after we were  
7 threatened. This is not a shell company; there's no proof of  
8 that. In fact, Miss Watson's affidavit disproves that.

9 However, Your Honor, I also want to go back to the  
10 claim about the \$2 million being sufficient. There was never  
11 any amendment to this contract that they'd only have to pay 2  
12 million. It was \$2.8 million in the beginning, Your Honor.  
13 The text messages that counsel showed don't change that.

14 In fact, we were being pressured by Maxim to start  
15 our work prior to getting any of the money, and we did, Your  
16 Honor. We started trying to get product even before the  
17 contract was signed. That's all that were good to go. We were  
18 trying to get the product before we got a dollar in. We  
19 continued to try to get the product when we only had 1.5 in,  
20 when we had 2 million in, and even after that point in time,  
21 Your Honor.

22 And by the way, when that text message was sent, I  
23 believe that was before the text message where Mr. Jensen had  
24 promised to us, "I think we should have everything straightened  
25 out by tomorrow," as far as the payment of the \$2.8 million.

1 So we would also rely on Mr. Jensen and Maxim to comply with  
2 their obligations of the contract, which they never did.

3 Well, let me go back to the contract, and I'm going  
4 to try to show the Court my screen. Does that work?

5 THE COURT: It does.

6 MR. NAVARRE: Okay, great. My 13-year-old son will  
7 be proud of me for showing me how to do that.

8 This is the contract, Your Honor. This is Section 21  
9 of the contract. And I've hopefully highlighted two of the  
10 sentences in this prior agreement provision, "Subject to the  
11 foregoing, effective as of the commencement of the term hereof,  
12 this agreement terminates and supersedes any prior agreements  
13 between jobber, which is Maxim, and Noil Corp., Inc. and its  
14 affiliates relating to the subject matter hereof."

15 And then, Your Honor, the last sentence, "No  
16 modification of this agreement and no waiver of any provision  
17 hereof shall be binding on Noil Corp., Inc. unless in writing  
18 and signed by Noil Corp., Inc."

19 So when counsel said that there was no requirement  
20 that things be in writing or be signed by Noil, that's directly  
21 contrary to the contract, Your Honor. The text messages back  
22 and forth with Miss Watson talks about an escrow, which she  
23 mistakenly thinks escrow is the same as what's in the invoice  
24 as far as trade account. That's not an escrow agreement, Your  
25 Honor.

1           There was no escrow agreement in the contract. The  
2 word escrow, as I went through with the Court before, is not in  
3 the contract. It's not in the invoice, Your Honor. And  
4 there's no proof that any of the money was removed from the  
5 trade account prior to the breaches and the subsequent downfall  
6 in the parties' relationship. So there's no evidence of a  
7 breach as far as the trade account, Your Honor, prior to the  
8 breaches made by Maxim.

9           So that goes back to the substantial likelihood.  
10 There is no contractual term for escrow agreement; therefore,  
11 there can be no breach of contract, Your Honor. There was no -  
12 - there is, in fact, a written contract for what's going to  
13 happen to the money and it's not to go into escrow, it's  
14 something different; therefore, there could be no justifiable  
15 reliance on that, so there can be no justifiable reliance, Your  
16 Honor.

17           THE COURT: What does the contract say is going to  
18 happen to the funds?

19           MR. NAVARRE: It'll be in the trade account, Your  
20 Honor.

21           THE COURT: And the trade account, according to the  
22 invoice, says they're going to be held until the product is  
23 lifted.

24           MR. NAVARRE: That's correct, Your Honor, that's  
25 correct. And by the time we got to that point in time, the

1 contract had already been breached. And there is black letter  
2 law in Texas that says that you cannot enforce a contract that  
3 you have breached, and there's no doubt that the first breach  
4 here was by Maxim. It's undisputed, Your Honor, that the first  
5 breach was by them.

6 And of course, by that point in time, we were far  
7 down the line as far as our efforts to try to procure the  
8 product with brokers and having to pay and having resources.

9 And on the other part of the likelihood of success on  
10 the fraud, Your Honor, the Texas Supreme Court cases are  
11 straight on point. They can't win on that claim. They  
12 certainly can't show the likelihood of success that's required  
13 for this extraordinary remedy. And that's separate and apart,  
14 Your Honor, from the issue that the Court first raised as far  
15 as adequate remedy of law.

16 So unless the Court has any questions, we would ask  
17 that the Court deny the motion for preliminary injunction.

18 MR. ORTIZ: If I may make a couple of quick points,  
19 Your Honor.

20 THE COURT: Of course. And, Mr. Ortiz, if you could  
21 address which breach was first, as the defendant is saying that  
22 it's undisputed that Maxim breached first.

23 MR. ORTIZ: I have no idea what he's talking about  
24 that was a breach. No one had ever mentioned to my client that  
25 there was a breach at all. My client wired \$2 million.

1           If he is saying that there was a breach because only  
2 \$2 million was wired, I would like to point Mr. Navarre to  
3 this.

4           MR. NAVARRE: Your Honor, I can clarify if the Court  
5 would like.

6           MR. ORTIZ: To this provision.

7           THE COURT: I'll let Mr. Ortiz --

8           MR. ORTIZ: Am I screen sharing?

9           THE COURT: Yes, you are.

10          MR. ORTIZ: So the prices -- the price terms on the  
11 contract say that they were the prices to jobber in effect at  
12 the time and place of each delivery for the particular product.  
13 So I don't know how the invoice for, you know, 2.8 million or  
14 whatever it was, could even dictate the price for a product  
15 that they took -- that at least a month went by, and they still  
16 hadn't been able to procure it.

17          Also, the money was only wired because they had  
18 represented that they have the product. They represented they  
19 had the product. They said we're ready, we've got it for you  
20 at the terminal, send us the money. That's when my client  
21 started working to get those funds wired. And then once they  
22 got wired, he realized that they don't have the product, so  
23 it's really misconstruing the facts as they played out.

24          But they said they had the product. We then, because  
25 they had the product, they took the price in effect at the

1 time, I guess, and then they created an invoice and that's how  
2 they calculated the dollar figure on that invoice. Sent us the  
3 invoice, which required payment I think on the day that it was  
4 sent, which would have been impossible, you know, to send the  
5 wire that quick basically at the time it was sent, and we got  
6 our funds together as quickly as we could. We sent them \$2  
7 million. They were unable to provide the product for at least  
8 a month and we don't know that they'd ever been able to source  
9 the product.

10 And again, as to his arguments that we can't -- that  
11 the contract requires that in order for it to be -- the terms  
12 to be altered, it needs to be in writing and signed by both  
13 parties. Well, nothing about the escrow structure that is  
14 discussed at length and agreed to clearly by the parties is  
15 contradictory to any of the terms of the contract. It simply  
16 supplements and clarifies certain terms of the contract.

17 I mean, the payment terms on the contract are  
18 extremely vague. For example, it says, "Jobber shall, except  
19 at Noil's option, pay Noil cash before delivery or pickup for  
20 crude products purchased hereunder." Well, the jobber, which  
21 is my client Maxim, did pay them \$2 million in cash before  
22 delivery or pickup of the crude.

23 Also, it says, "Change of payment terms. The terms  
24 of payment are subject to change based on agreement written  
25 with jobber," where we clearly have extensive agreement written

1 where we talk about the escrow structure. But the point is  
2 that the escrow structure, the escrow agreement, none of that  
3 contradicts the terms of this contract as it's written.

4 Also, the invoice, the trade account; that's all  
5 consistent with our escrow agreement and the escrow structure.  
6 So I don't know how he can say that the provision on the  
7 invoice regarding the trade account and the funds not to be  
8 disbursed from there until product is confirmed as delivered,  
9 how that is not contradictory to the crude products agreement.

10 But an escrow agreement or structure would be  
11 contradictory to the terms of the agreement because they're  
12 essentially the same thing if you respect the provisions as  
13 they're worded.

14 THE COURT: Mr. Ortiz, could I see the invoice again?

15 MR. ORTIZ: Absolutely.

16 THE COURT: So it looks like the invoice was for how  
17 much, 2.3?

18 MR. ORTIZ: \$2,329,897.50.

19 THE COURT: And so, the amendment that you -- you're  
20 saying the working amendment is the text back and forth that 2  
21 million will suffice, as opposed to the 2.3.

22 MR. ORTIZ: Yes. The \$2 million would allow them to  
23 get the product. In that same text message, they say that,  
24 well, you know, I could talk to Steve about just reducing the  
25 amount of volume that we give you based upon the \$1.5 million



1 figure that they had already received. But if we wait and get  
2 the other 500,000, we'll give you all of the volume that this  
3 represented in this invoice.

4 THE COURT: So it's not 2.3 because the price allowed  
5 the entire amount for 2 million even, correct, or no?

6 MR. ORTIZ: I think the agreement was that we will  
7 allow you to start lifting the product at the terminal so long  
8 as we have the \$2 million, because they knew that, at that  
9 point, just getting the balance of \$329,000 would be quick as  
10 soon as he had received that product or had gotten access to to  
11 lift the initial volume there that's listed on the invoice.

12 THE COURT: So there was still additional volume  
13 beyond the 2 million that was left under the contract, correct,  
14 that was still --

15 MR. ORTIZ: Well, the contract provides for I think  
16 it was 6.5 million gallons a month for up to a year; that's why  
17 it was sort of like an MSA or a master services agreement. The  
18 crude products agreement called for -- it may have been 50  
19 million gallons in the entire year unless it's terminated by  
20 one of the parties prior.

21 THE COURT: And what amount of volume did the \$2  
22 million account for?

23 MR. ORTIZ: Oh, that accounts for 1.5 million  
24 gallons.

25 THE COURT: Okay. So on that point about first in

1 time breach, Mr. Navarre, you wanted to respond.

2 MR. NAVARRE: Yes, Your Honor, if I can show my  
3 screen if you don't mind.

4 THE COURT: Yes, please. And Mr. Ortiz, you'll have  
5 the last word since it's your motion.

6 MR. NAVARRE: So here's the invoice, Your Honor, that  
7 the Court was asking about. This shows the payment due date, I  
8 highlighted here, is March 16 of 2021.

9 Contrary to counsel's suggestion or going through  
10 that it had to be wired that day because down here, it says  
11 double asterisk, "All payments are due by Friday at 11:00 a.m.  
12 Central time for the following week," so that would have made  
13 it March 19th.

14 On March 19th, they were required to pay -- and it's  
15 not \$2.3 million, Your Honor -- it's 2.795, so that's why I  
16 said \$2.8 million. That's the 20 percent overage that you'll  
17 see in the text messages that Mr. Jensen was not aware of, but  
18 he agreed is existing in the industry norm, so it's 2.8  
19 million. There it is signed by Mr. Jensen on behalf of Maxim.

20 So that is the amount of the payment that was due on  
21 March 19th which, I was checking, is the Friday of the  
22 following week. And even if it's for the Friday of next week  
23 of March 26th, they still didn't make the payment, so the  
24 breach is either on March 19th or March 26th. Either way,  
25 there's no evidence that any money was moved out of the trade

1 account before that date. In fact, the evidence is that this  
2 amount of money was not in the trade account because it was  
3 never paid.

4 Now what counsel is trying to suggest is that a text  
5 message where Miss Watson said we are good to go is a complete  
6 amendment to the contract and the pricing terms and the value  
7 terms. This is all, as counsel knows, there was never a  
8 reduction in the volume, no agreement to reduce the volume  
9 because to do so would have been sending the bad message to  
10 Valero that this party would not be able to continue to draw  
11 the same amount, so the parties agreed not to change the  
12 volume.

13 There's no term -- there's no written document  
14 changing the volume. Saying, Your Honor, saying that we are  
15 good to go is not a modification of a requirement to pay \$2.8  
16 million. You just can't get there in a text message, we are  
17 good to go.

18 And as I showed the Court before, the contract in  
19 Section 21, which is a subsequent provision to what counsel  
20 showed you, says it must be in writing and signed by Noil Corp.  
21 There's no amendment to this contract. If counsel's trying to  
22 claim that the invoice is an amendment, well, the invoice shows  
23 that it's got to be 2.8 million due March 16th, Friday  
24 following. Never happened, never happened. That is the first  
25 breach, Your Honor, and there is no evidence whatsoever before

1 the Court that there was any movement of monies out of the  
2 trade account by Maxim on that date.

3 So in answer to the Court's question, first breach,  
4 no doubt about it, it was done by Maxim. And Maxim cannot  
5 enforce a contract that they previously breached, especially  
6 when the contract does not even have the provision that they're  
7 trying to enforce. There is no escrow agreement. Escrow is  
8 not in the invoice, it's not in the contract, there's no  
9 structure for an escrow agreement, there's no third party like  
10 you would have a bank or a trustee or somebody holding the  
11 money, there's no conditions. It's a trade account, Your  
12 Honor, that's what it is. It's not an escrow agreement.

13 And Miss Watson did call it an escrow in several  
14 places; that was a mistake by her to call it that. I can  
15 guarantee you she'll never call it that again, but there's no  
16 escrow agreement. And that is contrary to the terms, the  
17 express terms of the contract itself and the invoice because it  
18 shows what's going to happen to the monies.

19 So counsel's attempt to say that saying it's, you  
20 know, creating an escrow agreement out of thin air is simply  
21 supplementing or clarifying the contract terms, what counsel is  
22 trying to do is get around the parol evidence rule that I'm  
23 sure the Court is rather familiar with. It doesn't supplement  
24 or clarify; it changes.

25 If you want an escrow agreement, you know how to do

1 an escrow agreement. People know how to do escrow agreements.  
2 You do them all the time for the sale of houses, for the sale  
3 of businesses, for holding funds like this. That's not the way  
4 it was, Your Honor. And for them to seek a specific  
5 performance injunction to create something that didn't exist,  
6 it's contrary to Texas law.

7 It's also contrary to Texas law, Your Honor, for the  
8 misrepresentation and we had no response to the consistent  
9 Texas Supreme Court authority. There could be no justifiable  
10 reliance on an alleged misrepresentation concerning subject  
11 matter that's in a written contract, especially a written  
12 contract here, Your Honor, where it says this is the only  
13 agreement, any prior agreements are terminated and any changes  
14 to this agreement must be in writing and signed, and there's  
15 nothing else that's been in writing or signed.

16 That's why we have contracts, Your Honor. We're not  
17 talking about, you know, two uneducated non-sophisticated  
18 people on a street corner shaking hands and then, you know,  
19 signing a post-it note. We're talking about sophisticated  
20 parties.

21 THE COURT: Mr. Navarre, the breach of contract that  
22 you're talking about is represented in the invoice for 2.8  
23 million --

24 MR. NAVARRE: Correct.

25 THE COURT: -- where only 2 million was paid,

1 correct?

2 MR. NAVARRE: Correct. And it wasn't even timely  
3 paid, Your Honor.

4 THE COURT: So that in essence makes it part of the  
5 contract, doesn't it, the invoice?

6 MR. NAVARRE: I agree, Your Honor. I think the  
7 invoice is part of the contract. And frankly, it's the only  
8 place where they can point to where there's agreement as to the  
9 trade account. And as counsel said, this is a master services  
10 agreement. We then have invoices on a continuing basis.

11 THE COURT: Okay. Mr. Ortiz.

12 MR. NAVARRE: I'm sorry, Your Honor. I just wanted  
13 to make sure I responded to the Court's question.

14 THE COURT: You did and that's very helpful.

15 MR. NAVARRE: Okay.

16 THE COURT: Mr. Ortiz.

17 MR. ORTIZ: Yes, a couple of things.

18 Mr. Navarre, if you would stop sharing your screen,  
19 I'd appreciate it. Thank you.

20 His claim that I have not responded to his arguments  
21 about the merger clause or, you know, no subsequent agreements  
22 because it wasn't reduced to writing. Again, the trade  
23 account, the terms of the trade account are clear. He says  
24 there's no conditions placed upon the trade account. Well,  
25 there are. I mean, if you just look at the trade account, the

1 provisions there, it says payment will be held by Noil in the  
2 trade account until the first lift has been confirmed as  
3 completed. That is a condition and that's a condition that was  
4 violated by the defendants.

5 Not only that, he mentioned the parol evidence rule.  
6 Well, there's an exception to the parol evidence rule, and  
7 that's when abused by fraud and that's exactly what we have in  
8 this case.

9 As to his argument that we waived -- I'm sorry --  
10 that we breached the contract first. Clearly, they waived any  
11 possible breach when you have them constantly afterwards say,  
12 you know, March 17th, please let me know when the funds for the  
13 escrow trade account should be issued. So they're still trying  
14 to get the funds on March 17. Here, we have the text message  
15 where they said they'll be good to go once they have the entire  
16 2 million; this is after March 17.

17 The wire was sent -- so the wire was sent on March  
18 22nd; that's the \$1.5 million wire. After they have the \$1.5  
19 million wire, they were saying, hey, send us that other  
20 500,000; that way, we can, you know, get you the volume and get  
21 you access at the terminal.

22 So clearly as of March 22nd, which is after the date  
23 he said that we breached, they are -- they have waived that  
24 breach and are still trying to get that other \$500,000 from us.  
25 But they did not, you know, cry foul and say you breached the

1 agreement, you know, we want to terminate it, or complained at  
2 all. No.

3 To the contrary, they were doing anything they could  
4 to continue to try and get these funds and continue to  
5 reference these funds as escrow funds or your agreed escrow  
6 amount was not received until late last Friday; that was when  
7 the schedule was to be released. You know, Steve will send you  
8 what you need to lift. So clearly, to the extent that there  
9 was ever a claim that we breached some agreement, it was waived  
10 by them.

11 And contrary to Mr. Navarre's arguments, the  
12 provisions on the invoice regarding the trade account do have  
13 conditions and those conditions were violated.

14 MR. NAVARRE: Your Honor, no waiver is required to be  
15 in writing and signed also in Section 21. There's no waiver.  
16 We just were trying to -- we were trying to work things out,  
17 Your Honor.

18 THE COURT: All right. If there's nothing further,  
19 the Court has what it needs to rule on the preliminary  
20 injunction and will do so by noon on Monday. The expiration  
21 would be close of business Monday, but the Court should have a  
22 ruling out by noon Monday.

23 If there's anything that you referenced or you want  
24 the Court to make sure we have in the record, Mr. Ortiz, like  
25 those texts that you put up on the screen, if you would just



1 supplement and just make sure those are in the record, then the  
2 Court will make sure that they are.

3 MR. ORTIZ: Absolutely. Thank you, Your Honor.

4 THE COURT: Okay. Is there anything further, Mr.  
5 Navarre?

6 MR. NAVARRE: No, Your Honor, just thank you again to  
7 you and your staff.

8 THE COURT: Thank you. Mr. Ortiz.

9 MR. ORTIZ: Yes. Thank you very much for your time  
10 and for hearing this on such an emergency basis.

11 THE COURT: Very good.

12 MR. ORTIZ: We appreciate it.

13 THE COURT: Thank you all. We are in recess.

14 MR. NAVARRE: Thank you, Your Honor.

15 THE COURT: Thank you.

16 (Hearing adjourned at 2:14 PM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing transcript is a true and accurate record of the proceedings.

A handwritten signature in cursive script that reads "Sonya M. Ledanski Hyde". The signature is written in dark ink and is positioned to the right of the line number 6.

Sonya Ledanski Hyde

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Date: October 12, 2021